



**THE ATTORNEY GENERAL  
OF TEXAS**

October 6, 1988

**JIM MATTOX  
ATTORNEY GENERAL**

Robert Bernstein, M.D., F.A.C.P. Open Records Decision No. 507  
Commissioner

Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

Re: Whether information  
used or developed in a  
Department of Health in-  
vestigation of complaint  
about a home health agency  
is confidential under  
section 10(d) of article  
4447u, V.T.C.S., and sec-  
tion 3(a)(1) of article  
6252-17a, V.T.C.S.  
(RQ-1446)

Dear Dr. Bernstein:

The Department of Health received a request for records of an investigation of a complaint against a home health agency. The requestor sought the results of an investigation of a complaint which he had filed on behalf of his father, who was a patient of the home health agency.

Home health agencies provide nursing care and other health services in the patient's home. V.T.C.S. art. 4447u, § 1. The department is responsible for licensing and regulating home health agencies, id. §§ 9, 11, and has authority to investigate complaints about the provision of home health services. Such investigations and the records thereof are governed by the following provisions of section 10 of article 4447u, V.T.C.S.:

(c) The department or its authorized representative shall investigate each complaint received regarding the provision of home health services and may, as a part of such investigation:

(1) conduct an unannounced inspection of a place of business, including an inspection of medical and personnel records . . . ;

(2) conduct an interview with any recipient of home health services which may be conducted in the home if the recipient consents;

(3) interview any physician or other health care practitioner, including home health agency personnel, who cares for a recipient of home health services.

(d) The reports, records, and working papers used or developed in an investigation made under this section are confidential.

(e) . . . The department's representative shall hold a conference with the person who is in charge of the agency when the inspection is completed, and the department's representative shall identify any records that were duplicated. Any agency records that are removed from an agency shall be removed only with the consent of the agency. (Emphasis added.)

V.T.C.S. art. 4447u, § 10.

The investigative file that you have forwarded consists of a complaint report, which records the information provided by the complainant, and the investigator's report, titled "Complaint Investigation." The latter document summarizes information learned from interviews with employees of the agency, and from reviews of the agency's personnel files and the patient's clinical record kept by the agency. Rules of the Department of Health require the home health agency to maintain a clinical record which includes the physician's treatment plan, clinical and progress notes written by the home health agency's employees, a medication sheet and medication administration records. See 25 T.A.C. §§ 115.2, 115.10(c)(1).

These documents are "reports [or] records . . . used or developed in an investigation" made under section 10 of article 4447u, V.T.C.S. Accordingly, section 10 makes them confidential, and they are excepted from public disclosure under the Open Records Act by section 3(a)(1) of that statute as "information deemed confidential by law, either Constitutional, statutory, or by judicial decision . . . ." V.T.C.S. art. 6252-17a, § 3(a)(1) (emphasis added).

The patient of the home health agency has sent you his written authorization for you to release to the requestor any records, including medical records, which pertain to him. Section 10(d) of article 4447u, V.T.C.S., is a comprehensive confidentiality provision, and nothing in its language suggests that a patient has any right to see information concerning him in the records of an investigation, nor that the department has any power to make this information available to him. See generally Open Records Decision No. 501 (1988) (concluding that article 9.39 of the Insurance Code does not prohibit the State Board of Insurance from releasing audit report to title company that furnished it to board); see also Open Records Decision No. 481 (1987) (providing that common law right of privacy does not prohibit subject of information from inspecting it).

The Open Records Act deals primarily with the general public's access to records. But see art. 6252-17a, §§ 3(a)(14), 14(c). It gives neither the subject of records nor his representative a special right of access to records concerning him, although he may use its procedures to gain access to information closed to the public by other law but open to him. Attorney General Opinions MW-381 (1981); MW-95 (1979); see Open Records Decision Nos. 501 (1988); 481 (1987). In this case you suggest that information in the investigative report extracted from the clinical record may be a medical record subject to the physician-patient privilege of the Medical Practice Act and possibly disclosable to the requestor under that provision. See V.T.C.S. art. 4495b, § 5.08.

Section 5.08 of article 4495b, V.T.C.S., the Medical Practice Act, provides as follows for the confidentiality of medical records:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b, § 5.08(b).

The Complaint Investigation summarizes information from the patient's clinical record including the physician's order and nurses' notes about the patient. Some of this information can be described as "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician" that are created by a physician. Id.; see also

Open Records Decision No. 487 (1988) (providing that section 5.08 of article 4495b, V.T.C.S., applies to records created under physician's supervision). It is unnecessary to decide which portions of the Complaint Investigation are confidential medical records because we have concluded that the Medical Practice Act does not authorize the Department of Health to make any such medical records available to the patient or the requestor.

The following provisions of section 5.08 of the Medical Practice Act are relevant to this information:

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

. . . . .

(h) Exceptions to the privilege of confidentiality, in other than court or administrative proceedings, allowing disclosure of confidential information by a physician, exist only to the following:

(1) governmental agencies if the disclosures are required or authorized by law;

. . . . .

(5) any person who bears a written consent of the patient or other person authorized to act on the patient's behalf for the release of confidential information, as provided by Subsection (j) of this section;

. . . . .

(j)(1) Consent for the release of confidential information must be in writing and signed by the patient . . . . .

(k) A physician shall furnish copies of medical records requested, or a summary or

narrative of the records, pursuant to a written consent for release of the information as provided by Subsection (j) of this section, except if the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient, and the physician may delete confidential information about another person . . . . The information shall be furnished by the physician within a reasonable period of time . . . . (Emphasis added.)

V.T.C.S. art. 4495b, § 5.08.

The Department of Health, in accordance with subsection (c) of section 5.08,

may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 5.08(c). The department obtained the medical information under its statutory authority to investigate complaints about home health agencies and subject to the confidentiality requirement set out in section 10(d) of article 4447u, V.T.C.S. It has no authority to disclose the information to the patient or his representative. See generally Open Records Decision No. 314 (1982) (discussing application of article 5561h, V.T.C.S., to school district's records of teacher's psychiatric evaluation).

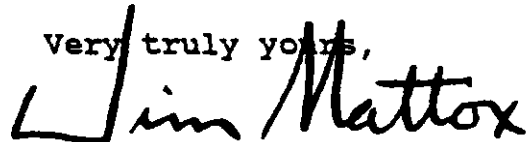
Moreover, the provision in subsection (k) of section 5.08 on the release of medical records pursuant to a written consent applies only to a physician. Not only does this subsection refer repeatedly to "the physician," but it also allows him to withhold information if he "determines that access to the information would be harmful to the physical, mental, or emotional health of the patient . . . ." This determination can only be made by the patient's physician, and not by a state agency which has acquired the records in connection with an investigation of a health services provider. The Department of Health has no authority under section 5.08 of the Medical Practice Act to release medical records to the patient or to the requestor who has the patient's written consent. Accordingly, the Department of Health may not disclose to the requestor any portion of the documents submitted for our review.

S U M M A R Y

Reports, records, and working papers used or developed by the Department of Health in an investigation of a home health agency under section 10 of article 4447u, V.T.C.S., are made confidential by section 10(d) of article 4447u, V.T.C.S. They are therefore excepted from public disclosure under article 6252-17a, V.T.C.S., of the Open Records Act, by section 3(a)(1) thereof.

Section 5.08(k) of article 4495b, the Medical Practice Act, provides that a physician shall furnish copies of a patient's medical records pursuant to the patient's written consent for release unless the physician determines that access to the information would harm the physical, mental, or emotional health of the patient. This section does not authorize the Department of Health to release a patient's medical records acquired in an investigation of a home health agency to the patient or to any person who has the patient's written consent for release of the records.

Very truly yours,



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